

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA,)	
)	
v.)	Crim. No. 94-11-B-S
)	
LIONEL LUSSIER,)	
)	
Defendant)	

***RECOMMENDED DECISION ON MOTION
TO VACATE, SET ASIDE OR CORRECT SENTENCE***

This matter is before the court on Lionel Lussier's Motion to Vacate, Set Aside or Correct Sentence filed pursuant to 28 U.S.C. § 2255. Lussier has filed this motion almost six years after judgment entered on December 19, 1994. I now recommend that the motion be **DENIED** not only because it is procedurally defaulted but also because it has no substantive merit.

Procedural Background

Lussier, along with co-defendants George H. Bennett, Ronald Madore, and Gary B. King, were indicted on April 5, 1994, and charged with conspiracy to possess marijuana with the intent to distribute (Count I) and carrying a firearm during and in relation to the drug conspiracy (Count II). Lussier alone was charged with being a felon in possession of a firearm (Count III). Lussier and Bennett went to trial on August 8, 1994, and verdicts of guilty were returned on all counts. King and Madore testified for the government at trial pursuant to a plea agreement. Lussier was sentenced on December 16, 1994, to a term of 60 months on the conspiracy charge and 318 months on the felon in possession charge.

Lussier appealed both his conviction and sentence. The judgment was affirmed on February 1, 1996. See United States v. Bennett, 75 F.3d 40, 44 (1st Cir. 1996). Lussier filed a petition for certiorari in the United States Supreme Court and that was denied on October 7, 1996. Lussier v. United States, 519 U.S. 845 (1996). This motion was filed on December 21, 2000. (Docket No. 180.) The United States filed its response on February 2, 2001. (Docket No. 183.) Lussier sought and then obtained without objection by the government a series of extensions in order to file a supplemental memorandum. His reply to the United States' response was filed on April 23, 2001 (Docket No. 186), and the matter is now in order for decision.

Statement of Facts

Both the United States' response to Lussier's motion (Docket No. 183 at 6 –31) and the opinion of the First Circuit Court of Appeals recite the facts of the case in some detail. Bennett, 75 F.3d at 44–45. In essence the four individuals named in the indictment agreed to “teach a lesson” to the individual who had beaten and robbed Madore, a small time drug dealer, the year before. The four men sought revenge by breaking into a trailer occupied by Madore's alleged assailant with the intent to beat him and rob him of any drugs or money they could find. Unfortunately they mistakenly entered the wrong trailer, terrorizing the occupants and eventually beating and inflicting a gunshot wound on David Wing who had had no prior involvement with any of them.

Discussion

In his motion petitioner argues that he is entitled to relief based upon two separate Supreme Court rulings, Apprendi v. New Jersey, 530 U.S. 466 (2000) and Bailey v. United States, 516 U.S. 137, (1995), both decided after his trial. Accordingly, because

his § 2255 motion was filed almost six years after his conviction became final, petitioner must first show why the § 2255 one-year period of limitation does not apply to this case.

As to the Apprendi claim Lussier argues entitlement to an exception arising under § 2255 when a new right is initially recognized by the Supreme Court and made retroactively applicable to cases on collateral review. 28 U.S.C. § 2255(3). In the context of the present controversy Apprendi, though not a federal drug case, stands for the proposition that before a defendant can be subjected to a higher maximum sentence under 21 U.S.C. § 841 based upon the quantity of a drug, the government must allege and prove to the jury beyond a reasonable doubt the amount of drugs involved. See Apprendi, 530 U.S. at 468, 476–97. Prior to the Apprendi decision federal courts routinely treated the drug quantity factor as a sentencing enhancement, allowing that factor to be determined by the judge by a preponderance of the evidence, even if the amount of drugs found raised the maximum potential penalty under § 841. Post Apprendi case law now has established that if the government is seeking to raise the maximum potential penalty for possession of marijuana (the drug involved in this case) above the five year “default statutory maximum” provided for in 18 U.S.C. § 841(b)(1)(D), the drug quantity must be proven beyond a reasonable doubt. See United States v. Duarte, 246 F.3d 56, 59 (1st Cir. 2001).

Lussier’s Apprendi argument fails in two respects. First, the Supreme Court has not announced that the Apprendi decision applies retroactively to cases on collateral review. Therefore Lussier cannot come within the only possible applicable exception to the § 2255 statute of limitation. Indeed the First Circuit when analyzing whether Apprendi could be grounds for allowing a second or successive habeas petition has

concluded that Apprendi has not been made retroactively applicable to cases on collateral review pursuant to § 2255 as it relates to second and successive petitions. See Sustache-Rivera v. United States, 221 F.3d 8, 15 (1st Cir. 2000). It follows that Lussier is therefore time barred by the one-year limitation.

However, even if Lussier could somehow avoid the statutory limitation, the Apprendi argument fails because Lussier's challenges are not within the Apprendi holding. The Apprendi decision by its own terms exempts "the fact of a prior conviction" from those enhancements that must be proven beyond a reasonable doubt. Id. at 488-90. Lussier's sentence was not enhanced because of the amount of marijuana involved in the case. His sentence was enhanced because he was an armed career offender under the Sentencing Guidelines and Lussier does not contest the validity of that status.¹

Lussier's second claim arises under Bailey, 516 U.S. 137, and relates to the firearm portion of the charge. The Supreme Court in Bailey defined "used" within 18 U.S.C. § 924(c) as "actively employed," working a redefinition of this element of § 924(c) in many circuits including the First. The jury instruction given by the court during Lussier's trial was improper after Bailey, although it correctly stated the law at the time of the trial. Lussier did not object to the jury instruction at trial nor on direct appeal.² Therefore to obtain collateral relief he would have to show cause for his

¹ Apprendi is an opinion of a fractured court, and the majority did remark that it was arguable despite its prior precedent to the contrary that, "a logical application of our reasoning today should apply if the recidivist issue were contested." Id. at 489-90.

² Before the First Circuit, Lussier conceded that there was sufficient evidence from which the jury could conclude that Lussier carried or used the gun during a drug crime. Id. at 45.

procedural default and actual prejudice or “actual innocence.” See Bousley v. United States, 523 U.S. 614, 622-24 (1998).³ On these facts Lussier can show neither.

In his reply memorandum Lussier makes a half-hearted attempt to argue ineffective assistance of counsel in failing to argue the § 924(c) issue on direct appeal. In the post- Bailey order denying a certificate of appeal in the companion case of George Bennett (Order Ct. No. 98-1295; Docket No. 179), the First Circuit explained that even if petitioner could show cause for his procedural defaults, in order for collateral relief to be warranted petitioner would have to show prejudice: that “the error in the jury instruction had a ‘substantial and injurious effect or influence in determining the jury’s verdict.’” (Id. at 1, quoting Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).) The court went on to note that under the facts of this case -- brandishing the weapon, pointing it at the victim’s head, and discharging it into his finger -- there was no question about active employment of the weapon. (Id. at 2.)⁴ Therefore the only evidence adduced at trial that formed the basis of the jury’s verdict involved active employment of the weapon and on collateral review Lussier takes no benefit from the erroneous instruction.

³ The crux of this aspect of the § 2255 claim is that the improper jury instruction *could have* resulted in Lussier’s conviction for conduct that Bailey placed beyond the reach of the statute. The jury instruction contained the now-discredited “control and intent to use” theory in relationship to the firearm. Bailey limited the statute’s reach to active use. When as a matter of statutory interpretation certain conduct is placed beyond the reach of the statute a defendant suffers a fundamental wrong if he is convicted for conduct that is not, in fact, illegal. In that sort of situation the statutory construction is retroactively applicable on collateral review. Ianniello v. United States, 10 F.3d 59, 63 (2nd Cir. 1993). See also Bousley, 516 U.S. at 620-21.

⁴ In his reply memorandum Lussier attempts to buttress his claim of “actual innocence” by reiterating certain aspects of co-defendant Ronald Madore’s testimony. Lussier argues that Madore was not worthy of belief because of certain inconsistencies between his Grand Jury testimony and trial testimony. Such inconsistencies were brought up at trial and explored fully in front of the jury. This line of argument does nothing to promote Lussier’s post-Bailey claim of actual innocence. The Bousley “actual innocence” inquiry is not merely an additional avenue to attack the sufficiency of the evidence for the conviction. The appropriate venue for this attack was the First Circuit Court of Appeals and Lussier has his answer on that score. See Bennett, 75 F.3d at 44-49.

Conclusion

Based upon the foregoing, I recommend that the court **DENY** petitioner's motion.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Margaret J. Kravchuk
U.S. Magistrate Judge

Dated June 6, 2001

U.S. District Court

District of Maine (Bangor)

CRIMINAL DOCKET FOR CASE #: 94-CR-11-ALL

USA v. MADORE, et al

Filed: 04/06/94

Dkt# in other court: None

Case Assigned to: Judge GEORGE Z. SINGAL

KIMBERLY COSTA (0)

BRETT D. BABER

Interested Party

[COR LD NTC cja]

BABER & WEEKS, 304 HANCOCK STREET, SUITE 2E

BANGOR, ME 04401

207-945-6111

Pending Counts:

NONE

Terminated Counts:

NONE

Complaints:

NONE

RONALD MADORE (1) BRUCE M. MERRILL, ESQ.
defendant [term 11/14/94]
[term 11/14/94] [COR LD NTC cja]
225 COMMERCIAL STREET, SUITE 401, PORTLAND, ME 04101
775-3333

Pending Counts:	Disposition
21:846 MARIHUANA-SELL, DISTRIBUTE, OR DISPENSE (Conspiracy to Possess with Intent to Distribute Less than 50 Kilograms of Marijuana) (1)	Imprisonment of 6 months; Self report 2:00 p.m. 12/12/94; Supervised Release of 3 years; Special Assessment of \$50; Restitution of \$966.59, joint & several.

Offense Level (opening): 4

Terminated Counts:

NONE

Complaints:

NONE

GARY B KING (2) BRUCE A. JORDAN
defendant [term 11/16/94]
[term 11/16/94] [COR LD NTC cja]
ARCHER, PERRY & JORDAN, P.A., CLARK HOUSE
130 HAMMOND STREET, BANGOR, ME 04401
(207) 947-8830

Pending Counts:	Disposition
21:846 MARIHUANA-SELL, DISTRIBUTE, OR DISPENSE (Conspiracy to Possess with Intent to Distribute Less than 50 Kilograms of Marijuana) (1)	Imprisonment of 60 months on Count 1 and 188 months on Count 5 to run concurrently; 60 months on Count 2 to be served consecutively to Cts 1 & 5 for a total of 248 months; Deft remanded to custody of US Marshal; Supervised Release of 5 years on Cts 1 & 5; Special Assessment of \$150; Restitution of \$966.59, joint and several.

(1)

18:924 FIREARMS (18:924(c) and Imprisonment of 60 months on
18:2 -- Use or Carrying of a Count 1 and 188 months on
Firearm During and in Relation Count 5 to run concurrently; 60
to a Drug Trafficking months on Count 2 to be
Offense) served consecutively to Cts 1 &

(2) 5 for a total of 248 months;
Deft remanded to custody of
US Marshal; Supervised Release
of 5 years on Cts 1 & 5;
Special Assessment of \$150;
Restitution of \$966.59, joint
and several.

(2)

18:922 FIREARMS (18:922(g)(1), Imprisonment of 60 months on
924(e)(1) and (2) -- Count 1 and 188 months on
Possession of a Firearm by a Count 5 to run concurrently; 60
Convicted Felon and Armed months on Count 2 to be
Career Criminal) served consecutively to Cts 1 &

(5) 5 for a total of 248 months;
Deft remanded to custody of
US Marshal; Supervised Release
of 5 years on Cts 1 & 5;
Special Assessment of \$150;
Restitution of \$966.59, joint
and several.

(5)

Offense Level (opening): 4

Terminated Counts:

NONE

Complaints:

NONE

LIONEL F LUSSIER (3) WILLIAM MASELLI, ESQ.

defendant

[term 12/19/94]

[term 12/19/94]

[COR LD NTC ret]

LAW OFFICE OF WILLIAM MASELLI, 98 COURT STREET

AUBURN, ME 04210

(207) 783-4800

LIONEL F LUSSIER

#39621-066

P.O. BOX 3000, WHITE DEER, PA 17887-3000

Pending Counts:

NONE

Terminated Counts:

Disposition

21:846 MARIHUANA-SELL, 60 months imprisonment on Count

DISTRIBUTE, OR DISPENSE 1 and 318 months on Count 3,

(Conspiracy to Possess with to run concurrently. 60 months

Intent to Distribute Less than on Count 2 to be served

50 Kilograms of Marijuana) consecutively to that imposed

(1) on Counts 1 & 3. Total

sentence of 378 months; Deft

remanded to custody of

US Marshal; Supervised release

of 5 years; Special

Assessment of \$150; Restitution

of \$966.59, joint &

several.

(1)

18:924 FIREARMS (18:924(c) and 60 months imprisonment on Count

18:2 -- Use or Carrying of a 1 and 318 months on Count 3,

Firearm During and in Relation to run concurrently. 60 months

to a Drug Trafficking on Count 2 to be served

Offense) consecutively to that imposed

(2) on Counts 1 & 3. Total

sentence of 378 months; Deft remanded to custody of

US Marshal; Supervised release

of 5 years; Special Assessment of \$150; Restitution

of \$966.59, joint & several.

(2)

18:922 FIREARMS (18:922(g)(1), 60 months imprisonment on Count
924(e)(1) and (2) -- 1 and 318 months on Count 3,
Possession of a Firearm by a to run concurrently. 60 months
Convicted Felon and Armed on Count 2 to be served
Career Criminal) consecutively to that imposed
(3) on Counts 1 & 3. Total sentence of 378 months; Deft
remanded to custody of US Marshal; Supervised release
of 5 years; Special Assessment of \$150; Restitution
of \$966.59, joint & several.
(3)

Offense Level (disposition): 4

Complaints:

NONE

GEORGE H BENNETT (4) N. LAURENCE WILLEY, JR.
defendant [term 11/22/94]
[term 11/22/94] 989-3366
[COR LD NTC cja]
FERRIS, DEARBORN & WILLEY, P.A., P.O. BOX 609
BREWER, ME 04412
MARSHALL H. WALDRON, JR
[term 04/08/94]
PALLAS & WALDRON
425 MAIN ST., WESTBROOK, ME 04092
207-854-2521

GEORGE H BENNETT
[COR LD NTC] [PRO SE]
03328-036
F.C.I. RAY BROOK, P.O. BOX 900
RAY BROOK, NY 12977

Pending Counts:	Disposition
21:846 MARIHUANA-SELL,	Imprisonment of 60 months on
DISTRIBUTE, OR DISPENSE	Count 1 and 300 months on
(Conspiracy to Possess with	Count 4, to run concurrently.
Intent to Distribute Less than	Imprisonment of 60 months on
50 Kilograms of Marijuana)	Count 2, to be served

(1) consecutively to Cts 1 & 4. total sentence of 360 months. Supervised Release of 5 years on counts 1 and 4 to be served concurrently.
Defendant remanded to custody of US Marshal; Special assessment of \$150; Restitution of \$966.59.

(1)

18:924 FIREARMS (18:924(c) and Imprisonment of 60 months on 18:2 -- Use or Carrying of a Count 1 and 300 months on Firearm During and in Relation Count 4, to run concurrently. to a Drug Trafficking Imprisonment of 60 months on Offense) Count 2, to be served

(2) consecutively to Cts 1 & 4.
total sentence of 360 months. Supervised Release of 5 years on counts 1 and 4 to be served concurrently.
Defendant remanded to custody of US Marshal; Special assessment of \$150; Restitution of \$966.59.

(2)

18:922 FIREARMS (18:922(g)(1), Imprisonment of 60 months on 924(e)(1) and (2) -- Count 1 and 300 months on Possession of a Firearm by a Count 4, to run concurrently. Convicted Felon and Armed Imprisonment of 60 months on Career Criminal) Count 2, to be served

(4) consecutively to Cts 1 & 4.
total sentence of 360 months. Supervised Release of 5 years on counts 1 and 4 to be served concurrently.
Defendant remanded to custody of US Marshal; Special assessment of \$150; Restitution of \$966.59.

(4)

Offense Level (opening): 4

Terminated Counts:

NONE

Complaints:

NONE

U. S. Attorneys:

JONATHAN R. CHAPMAN 780-3257

[COR]

F. MARK TERISON 780-3257

[COR LD NTC]

MARGARET D. MCGAUGHEY, ESQ.

[COR LD NTC]

OFFICE OF THE U.S. ATTORNEY

P.O. BOX 9718

PORTLAND, ME 04104-5018 (207) 780-3257

RAYMOND C. HURLEY, ESQ.

[COR LD NTC]

HURLEY & MINA, 12 CITY CENTER

PORTLAND, ME 04101

(207)772-6805